No. 1899

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CATHERINE D. STEAD ET AL.,
Complainants and Appellants,

vs.

ISABELLA M. CURTIS ET AL.,
Defendants and Appellees.

A FURTHER LIST OF ADDITIONAL AUTHORITIES IN SUPPORT OF APPELLANTS' BRIEF.

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The following additional authorities (a second list) are applicable to some, respectively, of the positions stated in the Brief for the Appellants.

The section numbers herein employed correspond, of course, to those in that Brief.

§ 354. A probate of will without notice is void; and is equally void as regards that portion of the heirs who appear in the proceeding.

a. On this point, the decision in *Estate of Cobb*, 49 Cal. 599, being the decision of the State Supreme Court on a statute of the State, is to be taken as settling the question in the Federal courts.

Union and Planters' Bank v. *Memphis*, 189 U. S. 72.

b. It is an elementary rule of law that every Court of the United States is absolutely bound to accept and administer that meaning and effect of any statute of a State which the highest Court of that State has by its decision decided to be its meaning and effect.

In *Leffingwell* v. *Warren,* 2 Black (67 U. S.) 603, for example, the Court say:

> "The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as part of the statute, and is as binding upon the courts of the United States as the text." (Citing authorities.)

That rule of law has been settled for more than four score years, and the following, running back to the year 1826, are some of the rulings in which it has been expressly laid down:

Chicago &c. Ry. v. *Minnesota,* 134 U. S. 456;
Bucher v. *Cheshire Ry. Co.,* 125 U. S. 555;
Burgess v. *Seligman,* 107 U. S. 33;
Scipio v. *Wright,* 101 U. S. 675;
United States v. *Fox,* 94 U. S. 321;
Railroad Co. v. *Railroad Co.,* 20 Wall. (87 U. S.) 138, 150;
Leffingwell v. *Warren,* 2 Black (67 U. S.) 599, 603;
Van Rensslaer v. *Kearney,* 11 How. (52 U. S.) 318;
Williamson v. *Berry,* 8 How. (49 U. S.) 559;
Nesmith v. *Sheldon,* 7 How. (48 U. S.) 818;
Massingill v. *Downs,* 7 How. (48 U. S.) 767;
Green v. *Neal,* 6 Pet. (31 U. S.) 299;
United States v. *Morrison,* 4 Pet. (29 U. S.) 137;

DeWolf v. *Rabaud,* 1 Pet. (26 U. S.) 501;
Bell v. *Morrison,* 1 Pet. (26 U. S.) 351;
Shelby v. *Guy,* 11 Wheat. (24 U. S.) 361, 367.

c. The language, "This was error," used by the Court in *Estate of Cobb,* 49 Cal. 599, can not truthfully or honestly be taken as indicating that the probate was only *voidable.* To do so, would be to seize on the form of an expression to pervert its meaning. Courts commonly speak of a *void* judgment as *erroneous* and commonly speak of a want of jurisdiction as "error," and such was the usage especially at the time (1875) when that decision of *Estate of Cobb* was made.

The following are examples where the *nullity* of a *void* judgment is spoken of by the courts as *error:*

Mutual Life Ins. Co. v. *Clover,* 36 Mo. 392;
Wood v. *Smith,* 11 Tex. 367;
Winslow v. *Lombard,* 57 Me. 357;
Penobscot R. Co. v. *Weeks,* 52 Me. 457;
Buffum v. *Ramsdell,* 55 Me. 252;
Brockman v. *McDonald,* 16 Ill. 112.

d. In *Estate of Cobb,* 49 Cal. 599, the Court could not have considered the want of notice in the probate *except on the ground that the probate,* from having been made without notice, *was equally void as regards the one heir* (the appellant) *who had voluntarily appeared.* For the express provision of Code of Civil Procedure of California (Sec. 938) was then in force, that *the appellant* must be "aggrieved" by the ruling reviewed. That express provision of the Code was taken *verbatim* from the

former Practice Act of April 29, 1851, where it may be seen in Cal. Stats. of 1851, p. 104.

That provision that *the appellant* must be "aggrieved" was expressly applied to probate appeals by the Act of May 7, 1855, which was afterward made Sec. 1714 of the Code of Civil Procedure. Its original form in the Act of May 7, 1855, may be seen in Cal. Stats. of 1855, p. 302.

And, independently of such express provision, it has always been settled, that where the Court below had jurisdiction *as regards the appellant,* it can not, merely on his appeal, reverse the judgment on a ground relating to jurisdiction as regards others. The following decisions are examples:

Culver v. *Cougle,* 165 Ill. 417, 420;
Reed v. *Boyd,* 84 Ill. 67, 71;
Rowan v. *Carroll,* 81 Ill. 224, 228;
Smith v. *Hickman,* 68 Ill. 314, 317;
Rees v. *Chicago,* 38 Ill. 332;
Pattison v. *Smith,* 93 Ind. 447;
Cool v. *Peters &c. Co.,* 87 Ind. 532, 539;
Lively v. *Husebye,* 60 Wash. 47, 53;
Fulton v. *Trading Co.,* 45 Wash. 136;
Halloran v. *Holmes,* 13 N. Dak. 412;
Brown v. *Wilson,* 45 S. Car. 519, 528;
Ward v. *Finnen,* 10 Tex. 187;
Boggess v. *Gamble,* 3 Cold. (43 Tenn.) 148, 150;
Liggatt v. *Morgan,* 2 Leigh (Va.) 84, 108.

The same is true as regards all errors. In *Richards* v. *Greene,* 78 Ill. 527, for example, the Court say:

"It is a familiar principle, that the appellant can not allege errors which, if they exist at all, relate exclusively to a person who is not complaining, and is not before the Court."

The same is expressly held in the following decisions:

Dobbs v. *Purington,* 136 Cal. 70;
Malone v. *Bosch,* 104 Cal. 680;
Golden Gate & Co. v. *Machine Works,* 82 Cal. 186;
McDonald v. *Taylor,* 89 Cal. 43;
People v. *Reis,* 76 Cal. 269, 275;
Tripp v. *Duane,* 74 Cal. 91;
Ball v. *Nichols,* 73 Cal. 193;
McCreery v. *Everding,* 44 Cal. 284;
People v. *Worth* (Cal.), 33 Pac. 913;
Press v. *Woodley,* 160 Ill. 437;
Tibbs v. *Allen,* 27 Ill. 125;
Thorn v. *Ingram,* 25 Ark. 53, 59;
Mining Co. v. *Costello,* 11 Ariz. 334, 343;
Powell v. *Sturdevant,* 85 Ala. 243;
Medlin v. *Wilkerson,* 81 Ala. 147;
Barker v. *Callihan,* 5 Ala. 708;
Oldham v. *Rowan,* 4 Bibb (7 Ky.) 544;
Williams v. *Neil,* 51 Tenn. 279, 281;
Teller v. *Hartman,* 16 Colo. 447, 449;
School Dist. v. *Flannigan,* 28 Colo. 431;
Lacy v. *Heirs of Williams,* 8 Tex. 182, 188;
Chappell v. *Brooks,* 33 Tex. 275, 277;
Herndon v. *Bremond,* 17 Tex. 432;
Oliver v. *Shoemaker,* 35 Mich. 464;
Griggs v. *Railway Co.,* 10 Mich. 123;
Warner v. *Whittaker,* 6 Mich. 133;

Boyd v. *Titzer,* 6 Cold. (46 Tenn.) 568;
Brunner v. *Warner,* 52 S. W. 668 (Tenn.);
Papin v. *Mussey,* 27 Mo. 445;
Eyre v. *Cook,* 9 Ia. 185.

§ 355. Where a judgment is against more than one defendant, it is at common law a unit, and if void as to one defendant, is void *in toto.* This is the settled law, and, on collateral attack, is so laid down in the following authorities:

Jackson v. *Hulse,* 6 Mackey (D. C.) 548, 555;
Watson v. *Steinan,* 19 R. I. 218;
St. Louis v. *Gleason,* 15 Mo. App. 25, 31;
Holbrook v. *Murray,* 5 Wend. (N. Y.) 161;
Altman v. *Holfeller,* 152 N. Y. 498;
Hanley v. *Donoghue,* 59 Md. 239, 243;
Wilbur v. *Abbott,* 60 N. H. 40;
Rangeley v. *Webster,* 11 N. H. 299, 307;
Hall v. *Williams,* 6 Pick. (23 Mass.) 485, 490;
Knapp v. *Abell,* 10 Allen (Mass.) 485, 490;
Wright v. *Andrews,* 130 Mass. 149, 151;
Martin v. *Williams,* 42 Miss. 210;
Comentz v. *Bank,* 85 Miss. 662;
Williams v. *Chalfant,* 82 Ill. 218;
Claflin v. *Dunne,* 129 Ill. 248;
Railroad Co. v. *Annis,* 62 Ill. App. 180;
Grace v. *Bank,* 62 Ill. App. 149;
Goldberg v. *Harvey,* 122 Ill. App. 106;
Blanchard v. *Gregory,* 14 Ohio 413;
Wood v. *Watkinson,* 17 Conn. 500.

So also, where a judgment, being a unit, is reversed on an appeal by one defendant, such reversal reverses the judgment *in toto,* as was done in *Estate of Cobb*, 49 Cal. 599. It is so expressly held in the following decisions:

Alling v. *Wenzel,* 133 Ill. 265, 277;
Railway Co. v. *Reno,* 123 Ill. 273, 278;
Jansen v. *Varnum,* 89 Ill. 100;
Williams v. *Chalfant,* 82 Ill. 218;
Earp v. *Lee,* 71 Ill. 194, 197;
Thompkins v. *Wiltberger,* 56 Ill. 386, 392;
Rees v. *Chicago,* 38 Ill. 322, 332;
Enos v. *Capps,* 12 Ill. 255, 257;
Mohr v. *McKenzie,* 60 Ill. App. 575, 577;
Brockman v. *McDonald,* 16 Ill. 112;
Altman v. *Hohfeller,* 152 N. Y. 498;
Bower v. *Hawes,* 115 N. Y. App. Div. 492;
Boice v. *Jones,* 106 N. Y. App. Div. 548;
Purcell v. *McCleary,* 10 Gratt. 246;
Donelly v. *Graham,* 77 Pa. St. 274;
Bradford v. *Taylor,* 64 Tex. 169, 171;
McRae v. *McWilliams,* 58 Tex. 328, 334;
Dickson v. *Burke,* 28 Tex. 117, 118;
Davenport v. *Hervey,* 30 Tex. 308, 319, 330;
Wood v. *Smith,* 11 Tex. 367;
Burleson v. *Henderson,* 4 Tex. 49, 59;
Mutual Life Ins. Co. v. *Clover,* 36 Mo. 392;
Rush v. *Rush,* 19 Mo. 142;
Weis v. *Aaron,* 75 Miss. 138;
Keifer v. *Barney Bros.,* 31 Ala. 192;
Buffum v. *Ramsdell,* 55 Me. 252.

So likewise, where a judgment was *in part* obtained by fraud, it must be set aside *in toto*. This is so held in

Hutchins v. *Lockett,* 39 Tex. 165.

This also comes out in the following rule: Where, on an appeal by one of a number of defendants, a judgment is found erroneous on the merits, *on a ground that would equally apply in favor of some who have not appealed,* the judgment must be reversed *in toto,* and equally for the benefit of those who have not appealed. It is so laid down and held in the following authorities:

3 Cyc., p. 411;
Alexander v. *Alexander,* 85 Va. 353, 362;
Walker's Exrs. v. *Page's Exrs.,* 21 Gratt, 636, 650;
Lenow v. *Lenow,* 8 Gratt, 349, 352;
Nicholson v. *Gloucester &c. School,* 93 Va. 101, 103;
Roanoke v. *Blair,* 107 Va. 639, 647;
Railway Co. v. *Reno,* 123 Ill. 273, 275-279;
Alling v. *Wenzell,* 35 Ill. App. 246, 248;
Clason v. *Morris,* 10 Johns. 525;
Bauer v. *Hawes,* 115 N. Y. App. Div. 492;
Boice v. *Jones,* 106 N. Y. App. Div. 548.

§ 515. The adjournment of the hearing *sine die,* made all the subsequent portion of the hearing a hearing *without notice.*

This is an obvious and self-evident truth, which no decision of any State Court can overthrow or subvert.

In § 515 of our Brief, we give three of the later decisions of the Supreme Court of California that spon-

taneously recognize and act upon this self-evident truth. We will now add one more decision:

In *Thompson* v. *Williams,* 76 Cal. 153, an assessment on corporate stock levied at an adjourned meeting of the directors held Oct. 9, 1883, was held void on the ground that the meeting was held without notice and without the presence of all the directors. And the Court there say:

> "As it does not appear that the hour of the day on the 9th of October on which the adjourned meeting was to be held on the last named day, was fixed at the meeting of the 8th, and no notice of such adjourned meeting was given the directors Allen and Thompson, who were not at the meeting of the 8th, we must hold that the assessment levied at the meeting of the 9th was levied substantially without notice and without authority. To hold that the adjourned meeting of the 9th, the hour of which was not fixed or declared by the meeting of the 8th of October, was a part of the meeting of the board of the 8th, and therefore (that) no further notice of it was required, would be to sanction an evasion of the law in regard to the notice to the directors of the meeting of the board. An inspection of the minutes of the meeting of the 8th would give no information to the directors not attending that meeting of the time to which that meeting had been adjourned. In fact, it does not appear that the board as a board ever did fix the hour on the 9th at which the adjourned meeting was to be held; and as it does not so appear, we must hold that the board on the 8th did not fix the hour at all. Under these circumstances, we can not hold that the meeting on the 9th, at which the assessment was levied, was anything more than a special meeting, of the calling of which the non-attending direct-

ors, Allen and Thompson, had no notice or knowledge of any kind. The assessment was therefore levied without authority, and was a nullity."

§ 556. The publication made by the Code Commissioners of California in 1872-1873, reporting certain statutes to have been superseded by the Codes, is without force or effect as operating any such supersession or repeal. This is so *held,* in

Needham v. *Thrasher,* 49 Cal. 392.

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